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Supreme Court, U.S.
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OFFICE OF THE CLERK

No. ——

In The Supreme Court of the United States

CURTIS KINNARD,
Petitioner,

v.

RUTHERFORD COUNTY BOARD OF EDUCATION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

* **James L. Harris**
ATTORNEY AT LAW
2400 Crestmoor Road
Suite 306
Nashville, TN 37215

(615) 386-7143

* *Counsel of Record*
Counsel for Petitioner

April, 2005

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

QUESTIONS PRESENTED FOR REVIEW

1. Did Not The Sixth Circuit Panel Err in Holding that the District Judge Did Not Abuse the Discretion Granted Him in Rules 401, 402, 403, and 406 of the Federal Rules of Evidence in Excluding the testimony of Dwight Ogleton, concerning a pattern, practice, or prior course of conduct evidencing racial discrimination?

2. Did Not The Sixth Circuit Panel Err in Holding that the District Judge Did Not Abuse the Discretion Granted Him in Rules 401, 402, 403, and 406 of the Federal Rules of Evidence in Excluding the testimony of Tommy Brown concerning a pattern, practice, or prior course of conduct evidencing racial discrimination?

3. Did Not the Sixth Circuit Panel Err in Holding that the Record Before the District Judge Did Not Create Genuine Issues of Material Fact Regarding Plaintiff/Petitioner's Retaliation Claim?

A LIST OF ALL PARTIES TO THE PROCEEDING AND AFFILIATIONS AS REQUIRED BY SUPREME COURT RULE 29.6

All parties involved are named in the caption. There are no parent companies nor nonwholly owned subsidiaries within the meaning of Supreme Court Rule 29.6.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS

The Opinion of the United States Court of Appeals for the Sixth Circuit was not recommended for full-text publication. It is reported at 109 Fed. Appx. 85, 2004 WL 1989303 (6th Cir. 2004).

CONCISE STATEMENT OF THE BASIS OF THE JURISDICTION OF THE UNITED STATES SUPREME COURT

1. The United States Court of Appeals for the Sixth Circuit issued its written opinion on September 2, 2004. (Apx. A)
2. There is no Order respecting rehearing, nor is there any Order granting an extension of time to file the petition for a writ of certiorari.
3. Supreme Court Rule 12.5 is not applicable to this petition for the writ of certiorari.
4. In that this is a petition for the writ of certiorari predicated on errors made by the United States Court of Appeals for the Sixth Circuit, the statute conferring United States Supreme Court jurisdiction over the instant controversy is believed by the Petitioner to be 28 USCA ¶ 1252.
5. In that neither the United States nor any department thereof is a party hereto, the provisions of Supreme Court Rule 29.4[b] and [c] are not applicable.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

Federal Rule of Evidence 401. Definition of "Relevant Evidence." "Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable ore less probable than it would be without the evidence.

Federal Rule of Evidence 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Federal Rule of Evidence 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rule of Evidence 406. Habit; Routine Practice. Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

42 USCA 2000e-2[a][1]. Employer Practices. It shall be an unlawful employment practice for an employer--to fail or refuse to hire or discharge any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

CONCISE STATEMENT OF THE CASE

Federal Jurisdiction in the United States District Court for the Middle District was founded on 28 USCA ¶ 1331, federal question, in that this is a suit under Title VII for racial discrimination in the workplace, and 28 USCA ¶ 1343, regarding the pendent claim. Plaintiff, an African-American man, was hired by the defendant as a Special Education teacher in 1993. The plaintiff's superiors did not recommend him for continued employment for the school year 1996-1997. The independent proof which was wrongfully excluded would have shown not only a wide disparity in the number of African-Americans in particular positions but also that the Board of Education was not in compliance with State Board of Education standards. Ultimately, Mr. Kinnard was not re-hired. He filed a timely charge with the Equal Opportunity Employment Commission, and later filed suit in U.S. District Court seeking damages and other relief occasioned by the defendant's violation of Title VII and retaliation against him for asserting his Title VII rights. Mr. Kinnard's retaliation claim was dismissed on Summary Judgment. The first effort at litigation of the remaining claims resulted in a mistrial; the second effort in a defense verdict. It is Mr. Kinnard's insistence, first, that Summary Judgment was not appropriate because the record contained genuine issues of material fact; and second, that the exclusion of certain evidence relevant to the defendant's racial employment policies was an abuse of

discretion violative of the applicable provisions of Article 4 of the Federal Rules of Evidence.

ARGUMENT

Even though Rule 406 of the Federal Rules of Evidence expressly permits the introduction of evidence concerning the "routine practice of an organization," and even though the Sixth Circuit accurately summarized the proffered testimony of Messrs. Ogleton and Brown, the appellate tribunal nevertheless - almost inexplicably - did not permit the jury to hear the subject testimony. Dwight Ogleton, the President of the local NAACP chapter, was prepared to inform the jury of a very serious statistical imbalance in the ration between African American students and African American faculty. Tommy Brown was prepared to give the jury similar information, but fro the perspective of a teacher within the defendant school system; an "eyeball witness." The District Judge's reasoning, correctly and succinctly summarized at the appellate level, was that he was not able to "see" how this proof bore on Mr. Kinnard's individual claim of racial discrimination. No serious, informed observer could deny the applicability of the well-settled rule that proof of discrimination as a pattern can operate as proof of discrimination against an individual within that pattern (citations omitted). But here, the Sixth Circuit chose in effect

to suggest, if not directly hold, that excluding the subject testimony was tantamount to harmless error. Respectfully, there was nothing harmless about it. In disregard of Rule 406, the jury in a suit for racial discrimination in the workplace was not allowed to know about a pattern of racial discrimination. As this court observed over thirty years ago, in the implementation of employment and personnel decisions, 42 USCA ¶ 2000e-2 does not tolerate any form or racial discrimination, whether it be subtle or overt. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 at 801, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), *on remand* 390 F.Supp. 501 (DC-Mo. 1975). There was nothing subtle about the trial judge's error, nothing subtle about the Sixth Circuit's error condoning it, and nothing subtle about the quantum of proof offered and excluded. There error was both clear and reversible.

Although the Sixth Circuit's summary of both the record and the applicable law concerning the retaliation claim that was dismissed on Summary Judgment was in all respects accurate, the appellate tribunal failed to take into account the Supreme's teaching in *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464 at 467, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962): Summary Judgment cannot be granted "...unless the truth is clear." The truth WAS NOT clear. For reasons apparently sufficient unto itself, the Sixth Circuit affirmed the District Judge's conclusion that the defendant's stated reason

for terminating Mr. Kinnard was other than pretextual. This had the direct effect of placing a permissive *imprimatur* on a circumstance whereby the trial court invaded the province of the jury in deciding a Rule 56 Motion on a predicate composed only of motive, intent, or witness credibility. This simply is not permitted in the Sixth Circuit, or elsewhere. *See, e.g., Hafford v. Seidner,* 183 F.3d 506 at 513-514 (6th Cir. 1999).

CONCLUSION

Supreme Court Rule 10[a] makes specific mention of circumstances where a federal appellate tribunal has sanctioned a departure from settled law by a lower court. Asa demonstrated, that is exactly what has transpired here. Mr. Kinnard respectfully petitions the United States Supreme Court to grant this application for certiorari; to reverse the Sixth Circuit; and to remand for a new trial with appropriate instructions. Concepts of fundamental fairness will admit of no other result.

Respectfully submitted,

James L. Harris (TN BPR #014173)
2400 Crestmoor Road, Suite 306
Nashville, TN 37215
(615) 386-7143
Attorney for Petitioner

APPENDIX

6TH CIRCUIT FILINGS:

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

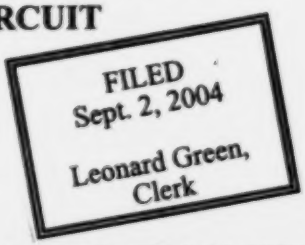
OPINION, FILED SEPTEMBER 2, 2004

A-1 through A-20

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 03-5353

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT



CURTIS KINNARD,	)	
	)	
Plaintiff-Appellant	)	
	)	
v.	)	**ON APPEAL FROM THE**
	)	**UNITED STATES**
	)	**DISTRICT COURT FOR**
RUTHERFORD COUNTY	)	**THE MIDDLE DISTRICT**
BOARD OF EDUCATION	)	**OF TENNESSEE**
	)	
Defendant-Appellee.	)	
	)	

BEFORE: KEITH, CLAY, and GIBBONS, Circuit Judges.

DAMON J. KEITH, Circuit Judge. Plaintiff-Appellant Curtis Kinnard ("Kinnard" or "plaintiff") appeals the jury verdict for the Defendant-Appellee Rutherford County Board of Education ("defendant") in this action under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, *et seq.*, claiming race discrimination in

employment, the trial court's evidentiary rulings, and the trial court's grant of summary judgment for the defendant on plaintiffs claim for retaliation. For the reasons that follow, we **AFFIRM** the trial court's decision.

I. BACKGROUND

Procedural

This case was originally filed on December 28, 1999. By consent of the parties, the case was transferred to U.S. Magistrate Judge Joe B. Brown, Kinnard secured new counsel after his initial counsel withdrew from the case.

The defendant moved for summary judgment, which the court granted in part and denied in part, dismissing Kinnard's retaliation claim under Title VII, but allowing him to proceed with his claim for discrimination under Title VII. The case proceeded to trial originally in July 2002, resulting in a mistrial. At the close of plaintiff's proofs at the trial, defendant moved for dismissal of plaintiffs claim brought pursuant to 42 U.S.C. § 1981(a). This motion was granted on the record. Kinnard's trial counsel from the first trial filed a motion to withdraw, which was granted; and Kinnard secured new counsel.

On December 17, 2002, the second jury trial began and the jury returned a verdict in favor of the defendant. Kinnard filed a Fed.R.Civ.P.59 motion, in the form of a Rule 60 motion. The trial court entered an order to set aside the Judgment and reentered it to allow the ten days for filing of post-trial motions. On February 7, 2003, plaintiff filed a motion for a new trial. On February 20, 2003, the trial court denied the motion, and plaintiff timely appealed.

Factual

In 1993, Kinnard, an African-American, was hired to work as a special education teacher at Smyrna High School in the Rutherford County School System.[1] To obtain employment, individuals had to go through a two-step process of interviews, which required an interview with: (1) the coordinator over the area in which the teacher was certified or would teach, who was Penny Hooper ("Hooper"), the Coordinator of Special Education for Rutherford County Schools; and (2) the principal of the school, who was Robert Raikes ("Raikes"). The Special Education Department Head at Smyrna High School during Kinnard's tenure was Elysee

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[1]Prior to Kinnard's hiring, two other African American special education teachers had been hired, neither of whom was employed at the time of Kinnard' s employment.

Beasley ("Beasley"); Beasley was not involved in the interview process.

As part of her responsibilities, Hooper interviewed Kinnard during the initial screening process and rated him a 3.5 (on a scale of 1 to 5). During Kinnard's employment, Hooper had been contacted by Raikes concerning Individual Education Plans ("IEP") not being properly completed and procedures not being properly followed. Raikes evaluated Kinnard on two separate occasions, recommending Kinnard for re-employment after year one, but not recommending him for re- employment following the second year. The scores on Kinnard's evaluations declined, and were only "slightly" above the threshold for maintaining employment. According to Kinnard, none of the evaluations made during the 1993-94 and 1994-95 school years mentioned any problems concerning IEP's nor did they mention problems with classroom management.

Following the 1994-95 school year, Raikes recommended that Kinnard not be rehired as a consequence of what he thought were Kinnard's classroom management and other problems. As a result, on September 20, 1995, Kinnard filed a charge of discrimination with the EEOC against the Rutherford County Board of Education ("Board of Education"), alleging that his termination from the High School was racially discriminatory. On September 21, 1995,

Kinnard appeared at a meeting of the Board of Education, where he complained about the discriminatory treatment he had received. A week later, in September 1995, Kinnard was hired as a social studies teacher at Smyrna Middle School to fill an interim position, and was instructed that the position was non-renewable. Donald Jernigan ("Jernigan"), the principal of Smyrna Middle School, hired Kinnard despite his negative reference from Smyrna High School because the position was for a limited time (the school year) and the position was not special education. At the time of his hire, Kinnard had already filed a charge of discrimination (against the defendant), and the Board of Education was aware of the EEOC charge which Kinnard had filed against it.

Kinnard was evaluated by Jernigan, who noted a number of deficiencies, Jernigan was not called upon to make the decision to recommend Kinnard for rehire, but has stated that he would have recommended against rehire. Moreover, based upon Kinnard's evaluation scores at Smyrna Middle School, which were below the minimum competencies for a teacher with his experience, he could not have been retained. Kinnard never filed a charge of discrimination regarding his employment at Smyrna Middle School.[2] On December 8,

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[2]The Tennessee Department of Education has promulgated standards applicable to the Rutherford County School System regarding the number of African American teachers who

1997, Kinnard filed a second charge of discrimination, alleging that he was not hired for the 1996-97 school year in retaliation for asserting his rights under Title VII.

II. DISCUSSION

A. Standard of Review

1. Summary Judgment

We review a district court's grant of summary judgment *de novo*, using the same standard under Federal Rule of Civil Procedure 56(c) used by the district court. *Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999) (en banc). We consider the record as it stood before the district court at the time of its ruling. *Niecko v. Emor Mktg.Co.*, 973 F.2d 1296, 1303 (6th Cir. 1992). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

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should be employed by the system. The report by Dr. Phyllis Washington, Director of Secondary Education, demonstrates that for the years relevant to this action, Rutherford County was not in compliance with these standards.

material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P.56(c). We view the evidence, all facts, and any inferences that may be drawn from the facts, in the light most favorable to the nonmoving party, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

To withstand summary judgment, the non-movant must show sufficient evidence to create a genuine issue of material fact. *Bell v. Ohio State University*, 351 F.3d 240, 246-247 (6th Cir. 2003). A mere scintilla of evidence is insufficient; "there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson v, Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U, S. 317, 322 (1986).

2. Evidentiary Rulings

This court reviews evidentiary rulings concerning relevance and admissibility for an abuse of discretion. *U.S. v. Brown*, 367 F.3d 549, 554 (6th Cir. 2004). "[U]nder the abuse of discretion standard employed with respect to evidentiary rulings, the [trial] court's decision[s] regarding

[]evidence should remain undisturbed unless this [court] is left with the definite and firm conviction that the district court clearly erred in its judgment after weighing the relevant factors, improperly applied the correct law, or inappropriately used the wrong legal standard." *Shanklin v. Norfolk S. Ry. Co.*, 369 F.3d 978, 988 (6th Cir. 2004).

B. The Trial Court's Evidentiary Rulings

Kinnard challenges several of the district court's evidentiary rulings, each of which is addressed in turn.

1. The Testimony of Dwight Ogleton[3]

When Kinnard attempted to introduce the testimony of Dwight Ogleton ("Ogleton"), the president of the local chapter of the NAACP, the trial court allowed counsel to conduct an extensive examination of Ogleton outside the jury's presence. During the examination, Ogleton testified

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[3]In his brief, the Appellant refers to the "testimony of Ogleton and Siebert," but only discusses the testimony of Dwight Ogleton. Appellant's Br. at 10. The parties have not cited the portions of the record that involve "Siebert," and have failed to identify a person with that last name. Accordingly, this court has treated the proffered testimony of Ogleton and "Siebert" as identical for purposes of this opinion.

that he had approached the two superintendents of the Rutherford County School System on multiple occasions in an effort to correct what was perceived as an unfair racial imbalance between the student population and the teacher population. J.A. at 300-05. Ogleton's testimony was excluded because, in the words of the trial court:

> [While] there is a [racial] imbalance between teachers and students[, t]hat is not the real issue. The issue is whether Mr. Kinnard was discriminated against because of his race. . . I just don't see that [Ogleton's] testimony is going to assist the jury in determining Mr. Kinnard's case.

(J.A. at 305).

Ogleton did testify that he spoke to principals and the superintendent about "[t]he concern of a lack of representation as far as educators are concerned . . .and that there were individuals that . . . were trying to get into the [school] system . . . and were having somewhat of a difficult time doing so." J.A. at 299. Ogleton's testimony, however, dealt with a time period which was in the four years preceding trial - at least two years after Kinnard had left the system. Thus, as the district court held, Ogleton's testimony provided no information concerning the School Board's employment practices during the relevant time frame - 1993 through 1996,

the time period during which Kinnard allegedly suffered race discrimination.

Relevancy[4] determinations are left to the discretion of the trial court and "should remain undisturbed unless this [court] is left with the definite and firm conviction that the district court clearly erred in its judgment after weighing the relevant factors, improperly applied the correct law, or inappropriately used the wrong legal standard." *Shanklin*, 369 F.3d at 988. After examining the record, and weighing the assertions of Kinnard, this court is not left with the "definite and firm conviction" that the trial court clearly erred in excluding the testimony of Ogleton. Even assuming *arguendo* that the trial court did abuse its discretion in excluding the testimony of Ogleton, a new trial is not

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[4]Rule 401 of the Federal Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Rule 403 of the Federal Rules of Evidence further provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

warranted unless, in the absence of the error, the outcome of the trial would have been different. *Morales v. American Honda Motor Co.*, 151 F.3d 500, 514 (6th Cir. 1998). Kinnard has failed to make such a showing.

2. The August 8, 2001 Letter from Morgan Branch

Morgan Branch, an employee with the State of Tennessee Department of Education, allegedly sent an August 8, 2001 Letter (the "Letter") to Kinnard. The Letter allegedly concerned the student- teacher ratio within the Rutherford County School System.[5] J.A. at 350-51. Reviewing the alleged content of the Letter, this court finds that it was irrelevant because it failed to make the relevant comparison - i.e., between the percentage of African-American teachers in the school system to the percentage of African-Americans in the relevant labor market who might apply for a teaching job. *Cf. Bell v. E.P.A.*, 232 F.3d 546, 553 (holding that statistical evidence that was too broad to support a prima facie case of systemic disparate treatment was nevertheless admissible in plaintiff's individual disparate treatment case, but noting that a "valid statistical analysis must encompass the relevant labor

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[5]The Letter does not appear to be included within the record before this court. Only a description of the Letter is provided in the parties' briefs and in the Joint Appendix, at pp. 350-51.

market"). An absolute mismatch between the two groups being compared for racial composition renders the Letter incapable of "mak[ing] the existence of [disparate treatment against Kinnard] more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

In his brief, Kinnard has made no showing of its relevance, again asserting that the Letter "dealt with the ratios between . . . students . . . and teachers." Appellants Br. at 10. Moreover, Kinnard has failed to show how its inclusion would have resulted in a different outcome at trial.

3. Limitation on the Testimony of Tommy Brown, Jerry Chestnut, and Melvin Daniels

Tommy Brown ("Brown"), a teacher at Smyrna High School, was prevented from testifying about a racial imbalance between the students and teachers at Smyrna High School.[6] J.A. at 466-67. Again, Kinnard has made no

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[6]Kinnard offered no evidence regarding the racial composition of the relevant applicant pool. Kinnard's reliance on *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097 (8th Cir. 1988), is misplaced. If Kinnard sought to introduce evidence of prior acts of discrimination, the *Estes* would have provided support for his position. Here, however, *Estes* does not support the proposition that a student-teacher ratio is evidence of discrimination. Such evidence standing alone is not relevant.

showing that the trial court abused its discretion by excluding Brown's testimony to that effect.[7]

Jerry Chestnut ("Chestnut"), a teacher at Smyrna High School, testified at the trial. Kinnard asserts in his brief that Chestnut's testimony was limited by the trial court. Appellant's Br. at 11. Finally, Kinnard asserts that the testimony of Melvin Daniel ("Daniel"), an administrator at Smyrna Middle School, was also limited at trial. Kinnard has not cited, and, after reviewing the transcript of the trial, this court has not identified any limitation placed upon Chestnut's or Daniel's testimony.

4. Admission of Evidence of the Smyrna Middle School Evaluation

The issue before the jury was whether the Board of Education discriminated against Kinnard when it failed to rehire him at Smyrna High School following the 1994-95 school year. The trial court specifically instructed Kinnard to avoid the implication that Raikes's evaluation kept him from

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[7]Moreover, essentially the same evidence was admitted through the testimony of Phyllis Washington, an administrator with the Board of Education, and Kinnard has not shown how this substantially similar evidence would have resulted in a different outcome at trial. J.A. at 347-51.

getting another job. J.A. at 392. Nonetheless, on both direct and cross-examination, Kinnard "opened the door" to discussion of his performance at Smyrna Middle School. For example, Kinnard was asked on direct whether he reactivated his application with the Board of Education, mentioned filling out applications, and further claimed that there were no problems with his evaluation. J.A. at 402. Based upon Kinnard opening the door to cross-examination, the trial court allowed counsel for the Board of Education to proceed. J.A. at 408-09.[8]

In his brief, Kinnard has failed to show how the trial court abused its discretion in admitting evidence of the Smyrna Middle School evaluation.[9] Moreover, Kinnard has not shown that, in the absence of the alleged error, the

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[8]According to the trial court, "[Kinnard] testified six times or volunteered that things happened after he went to the Board. He brought it up himself every time he had the chance; not saying retaliation but saying everything but." J.A. at 409.

[9]Rule 402 of the Federal Rules of Evidence provides that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." FED. R. EVID. 402.

outcome of the trial would have been different. *Morales*, 151 F.3d at 514.

5. Admission of the Stones River Academy Evaluations

During the testimony of Gail Tune ("Tune"), an employee in the personnel department of the Board of Education, Kinnard's counsel examined her about Kinnard's positive letters of recommendation from Stones River Academy Director Mona Sanderson ("Sanderson"). During cross-examination, the defendant pointed out that there were also recommendations from Sanderson that were not as favorable as those offered by Kinnard. The evaluations were part of Kinnard's personnel file that existed prior to any evaluation at Smyrna High School. At no point during the trial did Kinnard object to the introduction of the evaluations from Stones River Academy. By failing to object to the admission of the evaluations as evidence at trial, Kinnard waived such admission as an issue for appeal. *Investors Credit Corp. v. Batie*, 995 F.2d 85, 89 (6th Cir. 1993).[10] Furthermore, there has been no showing that a "substantial

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[10]Even if the issue had been preserved for appeal, Kinnard has failed to make a showing that the trial court abused its discretion by admitting the Stones River Academy evaluations.

right of a party is affected" by this foreclosure. *American Anodco, Inc. v. Reynolds Metal Co.*, 743 F.2d 417, 424 (6th Cir. 1984).

C. The Retaliation Claim

To establish a prima facie case of retaliation under Title VII, a plaintiff must prove by a preponderance of the evidence:

> 1) plaintiff engaged in activity protected by Title VII; 2) plaintiffs exercise of [such protected activity] was known by the defendant; 3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and 4) that there was a causal connection between the protected activity and the adverse employment action.

DiCarlo v. Potter, 358 F.3d 408, 420 (6th Cir. 2004) (citation omitted).

"The burden of establishing a prima facie case in a retaliation action is not onerous, but one easily met." *Id.* "Once a prima facie case is established, the burden of producing some non-discriminatory reason falls upon the defendant." *Id.* "If the defendant demonstrates such, the plaintiff then assumes the burden of showing that the reasons

given by the defendant were a pretext for retaliation." *Id.* A plaintiff may establish pretext by showing that the proffered reason: (1) has no basis in fact; (2) did not actually motivate the adverse employment action; or (3) was insufficient to motivate the adverse employment action. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994).

Even assuming, as does the dissent, that Kinnard could have established a prima facie case of retaliation,[11] the defendant presented a legitimate, non-discriminatory reason for not rehiring Kinnard, i.e., Kinnard's deficient work performance. Kinnard has presented no evidence that the reason offered by the defendant for not rehiring Kinnard was simply a pretext for underlying discrimination. Kinnard cannot show pretext by simply asserting his personal belief that he was the most qualified or that Jernigan or Raikes had no problem with his work performance.

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[11] As the trial court noted, however, "'when opposing a motion for summary judgment on a retaliation claim, the nonmoving party may not rely on the mere fact that an adverse employment action followed protected conduct.' (citing *Collyer v. Darling*, 98 F.3d 211, 229 (6th Cir. 1996). That is to say, plaintiff must adduce some evidence that the adverse action was taken at least in part because of his EEOC filing. This plaintiff has simply failed to do [so]." J.A. at 127.

Accordingly, the trial court did not err when it granted the defendant's motion for summary judgment on Kinnard's retaliation claim.

III. CONCLUSION

For the reasons stated above, the trial court's evidentiary rulings and grant of summary judgment for the defendant are **AFFIRMED**.

CLAY, Circuit Judge, concurring in part and dissenting in part. Contrary to the majority's decision, the district court's dismissal of Kinnard's retaliation claim should be reversed. The primary reason for the district court's grant of summary judgment was its conclusion that there was no causal connection between Kinnard's protected activity (filing an EEOC charge and complaining about race discrimination to the School Board) and his adverse employment action (the conversion of his permanent teaching position at Smyrna Middle School to a temporary one). I believe there was a jury question on this issue.

There was an extremely short time-frame between the dates Kinnard filed his EEOC charge and complained to the School Board and the date he was informed that the Middle School position for which he had been hired was temporary - only about one week. Further, in denying summary judgment on Kinnard' s race discrimination claim, the trial court held that Kinnard had demonstrated the existence of a genuine issue of material fact as to whether the School Board's proffered reason for the non-renewal of Kinnard's contract at Smyrna High School was in fact pretextual. Among other things, the court noted the lack of documentation supporting Principal Raikes' decision not to recommend Kinnard for hire following his second year at the high school. Implicit in this finding was the conclusion that a jury could infer that Principal Raikes' had been dishonest

and wished to conceal the School Board's true reason for not renewing Kinnard's contract at the high school. Although Kinnard's retaliation claim does not challenge that particular employment decision, but rather the decision regarding the Middle School position as well as subsequent openings in the school system, a reasonable jury could infer that Raikes had a motive to retaliate against Kinnard after Kinnard filed an EEOC charge and complained to the School Board.

The record suggests that Principal Raikes spoke about Kinnard with Principal Jernigan of the Middle School prior to Jernigan hiring Kinnard. Arguably, because of something Raikes said in that conversation, Jernigan converted the Middle School position into a temporary position. Thus, the short time-frame between the protected activity and the adverse employment action, combined with Raikes' involvement with the hiring process at the Middle School, would permit a reasonable jury to infer that Kinnard suffered retaliation when he was offered only a temporary position, even though (as Kinnard claims) the position previously had been posted as permanent in nature.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

JUDGMENT, FILED JANUARY 30, 2003

B-1 through B-2

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

JUDGMENT IN A CIVIL CASE

FILED
Jan. 30, 2003
Middle District
of Tennessee

CURTIS KINNARD

vs. **No. 3:99-1203**
Magistrate Judge Brown

RUTHERFORD COUNTY BOARD OF EDUCATION

☑ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict as reflected in the verdict form filed December 18, 2002, having found that the plaintiff did not prove by a preponderance of the evidence that race was a substantial cause or motivating factor in the Rutherford County Board of Education's decision riot to renew his contract as a Special Education teacher.

○ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

The jury having found in favor of the defendants Rutherford County Board of Education, and against the plalntiff, Curtis Kinnard,

IT IS ORDERED AND ADJUDGED that this action is dismissed with prejudice.

January 30, 2003
DATE

ROGER A. MILAM, CLERK
/s/ Tina Smith
BY Tina Smith
DEPUTY CLERK

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

JUDGMENT, FILED DECEMBER 19, 2002

C-1 through C-2

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

JUDGMENT IN A CIVIL CASE

FILED
Dec. 19, 2002
Middle District
of Tennessee

CURTIS KINNARD

vs. **No. 3:99-1203**
Magistrate Judge Brown

RUTHERFORD COUNTY BOARD OF EDUCATION

✓ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict as reflected in the verdict form filed December 18, 2002, having found that the plaintiff did not prove by a preponderance of the evidence that race was a substantial cause or motivating factor in the Rutherford County Board of Education's decision not to renew his contract as a Special Education teacher.

o Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

The jury having found in favor of the defendant, Rutherford County Board of Education, and against the plaintiff, Curtis Kinnard,

IT IS ORDERED AND ADJUDGED that this action is dismissed with prejudice.

December 19, 2002
DATE

ROGER A. MILAM, CLERK
/s/ Tina Smith
BY Tina Smith
DEPUTY CLERK

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

ORDER, FILED APRIL 22, 2002

D-1 through D-1

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CURTIS KINNARD	)	
	)	
v.	)	**No. 3:99-1203**
	)	**Magistrate Judge Brown**
RUTHERFORD COUNTY	)	
BOARD OF EDUCATION	)	

FILED
April 22, 2002
Middle District
of Tennessee

ORDER

This civil action is before the undersigned for all further proceedings, pursuant to the consent of the parties (Docket Entry No. 4). Currently pending is defendant's motion for summary judgment (Docket Entry No. 39). For the reasons stated in the accompanying Memorandum, defendant's motion is **GRANTED** in part and **DENIED** in part. Plaintiff's Title VII retaliation claim is hereby DISMISSED; the case will proceed to trial on plaintiff's Title VII discrimination claim.

So **ORDERED**.

/s/ Joe B. Brown
JOE B. BROWN
United States Magistrate Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

MEMORANDUM, FILED APRIL 22, 2002

E-1 through E-12

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CURTIS KINNARD	)	
	)	
v.	)	**No. 3:99-1203**
	)	**Magistrate Judge Brown**
RUTHERFORD COUNTY	)	
BOARD OF EDUCATION	)	

FILED
April 22, 2002
Middle District
of Tennessee

MEMORANDUM

This civil action is before the undersigned for all further proceedings, pursuant to the consent of the parties (Docket Entry No. 4). Currently pending is defendant's motion for summary judgment (Docket Entry No. 39). For the reasons stated below, and by Order entered contemporaneously herewith, defendant's motion is **GRANTED** in part and **DENIED** in part.

I. BACKGROUND

The following statement of undisputed facts is taken from plaintiff's response (Docket Entry No. 46) to defendant's Local Rule 8(b) (7) (b.) submission:

In 1993, plaintiff was hired to work as a special education teacher at Smyrna High School in the Rutherford County System. To be employed with Rutherford County School System, individuals had to go through a two-step process of interviews. That interview process required an interview with the coordinator over the area in which the teacher was certified or would teach and the principal of the school.

The principal at Smyrna High School was Robert Raikes. The Special Education Department head at Smyrna High School during plaintiff's tenure and to the present was another teacher by the name of Elysse Beasley. She became the department head sometime around 1986 to 1987. Prior to plaintiff being hired at Smyrna High School as a Special Ed teacher, there had been two other African-American Special Ed teachers.

Penny Hooper is the Coordinator of Special Education for Rutherford County School System. She has been in that position since July of 1988 or 1989. As part of her responsibilities at the time of plaintiff's employment, she interviewed plaintiff at the initial screening process and rated him a 3.5 on a scale of 1 to 5. During the course of plaintiff's employment at Smyrna High School, Hooper had been contacted by Raikes, the principal, about the IEP or Individual

Education Plans not being completed properly, procedures not being followed and notices not being sent regarding the IEPs.

Raikes, plaintiff's principal, evaluated plaintiff on two separate occasions. He did not recommend plaintiff for re-employment following plaintiff's second year. Raikes did recommend him for re-employment following his first year but generally recommended people back following the first year to see if they were going to improve.

In September of 1995, plaintiff was hired as a social studies teacher at Smyrna Middle School, to fill an interim position from October 1995 to May 1996. When he was hired for the Smyrna Middle School positions plaintiff was told that he would not be renewed the following year in that position, but that he would have to reactivate his application. Smyrna Middle School principal Don Jernigan hired plaintiff based upon his interview with him after interviewing a number of other people. Jernigan gave plaintiff the job in the interim position, despite a negative job reference from Smyrna High School, because he was not interested in placing plaintiff in a Special Education setting. Had Jernigan been called upon to make a recommendation regarding re-employment of plaintiff, he would have recommended against it.

Plaintiff filed two charges of discrimination, one following his non-renewal at Smyrna High School and the

other following defendant's failure to hire him in any position for the 1997-96 school year. Plaintiff did not file a charge of discrimination related to his employment at Smyrna Middle School, which began after his first charge and ended more than 12 months prior to his second charge.

II. DISCUSSION

A. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment may be rendered if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." Here, defendant contends that summary judgment on both of plaintiff's claims should be entered in its favor. "As the party moving for summary judgment, defendants bear the burden of showing the absence of a genuine issue of material fact as to at least one essential element of plaintiff's claim." *Logan v. Denny's, Inc.*, 259 F.3d 553, 566 (6th Cir. 2001). If such a showing is made, plaintiff then bears the burden of showing by competent evidence specific facts that reveal a genuine issue for trial. *Id.* In reviewing the motion and plaintiff's response thereto, the Court must view the evidence and draw all reasonable inferences therefrom in the light most favorable

to plaintiff, the non-moving party. *Williams v. Int'l Paper Co.*, 227 F.3d 706, 710 (6th Cir. 2000).

B. Plaintiff's Discrimination Claim

In order to proceed to trial on a Title VII discrimination claim, a plaintiff must first establish a *prima facie* case either by presenting direct evidence of intentional discrimination, or by presenting circumstantial evidence that creates an inference of discrimination. *See Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F3d 1241, 1246 (6th Cir. 1995). The burden of production then shifts to the defendant to rebut this presumption by articulating a legitimate, non-discriminatory reason for its decision. *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). To meet this burden, the employer need not show that there was good reason for the employment action, but only that the employment action was not motivated by discriminatory animus. *Id.* at 257.

The ultimate burden of persuading the trier of fact that there was intentional discrimination remains at all times with the plaintiff. *Id.* at 253. Once the employer articulates a non-discriminatory reason, the inference of discrimination arising from the *prima facie* case is destroyed. *Id.* at 255. The plaintiff must then prove that the employer's proffered reason is a pretext for discrimination. *Id.* at 256.

Here, plaintiff has not adduced any direct evidence of racial discrimination, and so must establish his *prima facie* case through circumstantial evidence by showing: (1) that he is a member of a protected class; (2) that he suffered an adverse employment action; (3) that he was qualified for the job; and (4) that he was replaced by someone outside the protected class or was treated differently from similarly situated individuals outside of the protected class. *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582-83 (6th Cir. 1992)

Defendant's sole contention with regard to plaintiff's *prima facie* case is that he has not demonstrated that he was qualified for continued employment or re-employment with the Rutherford County school system, inasmuch as he was not meeting the county's legitimate expectations or performing to its satisfaction. Defendant further contends that, even if plaintiff is deemed to have made a *prima facie* case, his unsatisfactory job performance amounts to a legitimate, nondiscriminatory reason for the adverse actions taken by the county.

As recently noted by the Sixth Circuit Court of Appeals,

> [a] court must evaluate whether a plaintiff established his qualifications independent of

> the employer's proffered nondiscriminatory reasons for discharge. *See Curie [v. Catholic Diocese of Toledo]*, 206 F.3d at 660-61 ("[W]hen assessing whether a plaintiff has met her employer's legitimate expectations at the *prima facie* stage ... a court must examine plaintiffs' evidence independent of the nondiscriminatory reason 'produced' by the defense as its reason for terminating plaintiff.") In short, a court must be careful not to conflate the distinct stages of the *McDonnel Douglas* test.

Cicero v. Borg-Warner Automotive, Inc., 280 F.3d 579, 585 (6th Cir. 2002). Accordingly, defendant's argument that plaintiff's unsatisfactory job performance renders him unqualified for the position is unavailing. However, this alleged failure to meet defendant's legitimate expectations is sufficient to satisfy defendant's burden of producing a legitimate, nondiscriminatory reason for its adverse actions, thereby destroying the inference of discrimination arising from plaintiff's *prima facie* case.

It thus becomes plaintiff's burden to produce evidence demonstrating that this asserted nondiscriminatory reason is pretextual, and that discrimination is the real reason that he was not re-employed by the county or recommended for re-employment. Defendant argues that plaintiff has failed to carry this burden, especially in light of the presumption of

nondiscrimination recognized in this circuit when the individual who allegedly discriminated against the plaintiff also hired the plaintiff. See *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461, 463-64 (6th Cir. 1995)

However, the Court concludes that plaintiff, through his affidavit, deposition excerpts, and defendant's responses to his requests for admissions (Docket Entry No. 44), has demonstrated the existence of a genuine factual issue as to whether defendant's proffered reason is in fact pretext for discrimination.[1] In view of this evidence, particularly the lopsided hiring statistics admitted by defendant, its alleged failure to follow through with a minority recruitment/ retention plan submitted by Dr. Phyllis Washington, and the lack of documentation supporting Principal Raikes' decision to not recommend plaintiff for rehire following his second year at Smyrna High School[2], the Court finds that plaintiff has

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[1]It is noted that plaintiff's claim is one of disparate treatment. Defendant's argument in its reply brief that plaintiff's use of statistical evidence is insufficient to establish a *prima facie* disparate impact claim is misplaced, as this evidence is clearly offered as circumstantial support for plaintiff's claim of discriminatory treatment.

[2]While plaintiff's summative evaluations for these two years show a downward trend in his classroom management scores, those scores did not fall below 3 out of a possible 5, there

made a sufficient showing of pretext to at least raise a triable issue regarding defendant's motives.

Moreover, it appears that the application of the "same actor" inference should be left to the jury (as it was in *Buhrmaster*), to the extent it believes such application is supported by the facts. See Williams v. Vitro Svcs. Corp., 144 F.3d 1438, 1443 (11th Cir. 1998) ("[W]ithin the burden-shifting framework . . ., it is important to reiterate that this inference is a permissible- -not a mandatory- - inference that a jury may make in deciding whether intentional discrimination motivated the employer's conduct." (*citing Buhrmaster, Supra*)). Accordingly, in light of the existence of genuine factual issues which necessitate the trial of this matter, the Court concludes that it is the jury's province to weigh the "same actor" facts presented here against plaintiff's evidence of pretext, and (upon a proper charge allowing the inference) to either infer nondiscrimination or not in its sole discretion.

C. Plaintiff's Retaliation Claim

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were no comments written in the spaces provided to support these ratings, and plaintiff's scores went up in other areas (Docket Entry No. 50, Exh. A)

> To establish a *prima facie* case of retaliation, the plaintiff must show that (1) he engaged in activity protected under Title VII; (2) the exercise of the protected right was known to the employer; (3) the plaintiff suffered adverse employment action; and (4) there is a causal connection between the protected activity and the adverse employment action.

Little v. BP Exploration & Oil Co., 265 F.3d 357, 363 (6th Cir. 2001) (*citing Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792 (6th Cir. 2000)). Though the *prima facie* burden presents a relatively minimal hurdle for Title VII plaintiffs, *see Canitia v. Yellow Freight Systems. Inc.*, 894 F.2d 196, 198 (6th Cir. 1990), it remains a burden that must be carried through the presentation of some competent evidence as to each *prima facie* requirement.

Although plaintiff is correct in pointing out that "Defendant's argument with respect to Mr. Kinnard's retaliation claim also rests on the legitimacy of Defendant's asserted legitimate non-discriminatory reason for the non-renewal of Mr. Kinnard's contract" (Docket Entry No. 43, p.7 & n.1), defendant does address (if not argue) the *prima facie* requirements in its memorandum, and appropriately notes that "when opposing a motion for summary judgment on a retaliation claim, the nonmoving party may not rely on the

mere fact that an adverse employment action followed protected conduct." (Docket Entry No. 40, pp.6-7) (*citing Collyer v. Darling*, 98 F.3d 211, 229 (6th Cir. 1996)). That is to say, plaintiff must adduce some evidence that the adverse action was taken at least in part because of his EEOC filing. This, plaintiff has simply failed to do.

Plaintiff alleges that defendant retaliated against him by reducing the Smyrna Middle School position to an interim position prior to offering it to him, when the position had been originally posted as fulltime, and by failing thereafter to hire him for any position in the school system (Docket Entry No. 26, ¶¶ 14-16). These instances are also alleged in support of his discrimination claim. However, plaintiff has offered no evidence linking these instances with the filing of his first EEOC complaint, and none is ascertainable from the record, other than the fact that they occurred close in time to his protected filing. "While it is true that temporal proximity alone is insufficient to establish a causal connection for a retaliation claim, *Nguyen v. City of Cleveland*, 229 F.3d 559,566 (6th Cir. 2000), there are circumstances where temporal proximity considered with other evidence of retaliatory conduct would be sufficient to establish a causal connection." *Little*, 265 F.3d at 363-64. In *Little*, such other information deemed sufficient to create a factual issue as to the existence of a causal connection included proof that co-employees were told to make false claims of theft and

harassment against the plaintiff, or else lose their jobs, and proof that the plaintiff was targeted for disciplinary action relating to conduct for which other employees were not disciplined. Conversely, plaintiff here has adduced no additional evidence from which a reasonable jury could infer that the conduct complained of was prompted by his EEOC filing. Thus, plaintiff has failed to carry his *prima facie* burden, and his retaliation claim must therefore be dismissed.

III. CONCLUSION

In light of the foregoing, defendant's motion for summary judgment is **GRANTED** in part and **DENIED** in part. An appropriate Order will enter.

ENTERED this 19 day of April, 2002.

/s/ Joe B. Brown
JOE B. BROWN
United States Magistrate Judge